IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5011 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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KAVITABEN GOVINDRAM SURTANI WIDOW OF GOVINDRAM SURTANI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 5011 of 2002

MR AM PAREKH for Petitioner No. 1

MR H H PATEL APP for Respondent No. 1

NOTICE SERVED for Respondent No. 2

NOTICE UNSERVED for Respondent No. 3

MR NIRAV C THAKKAR for Respondent No. 4

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 14/08/2002

ORAL JUDGEMENT

#. Heard Mr. A.M.Parekh learned counsel for the

petitioner -original complainant and Mr. H.M.Patel learned AGP and Mr.Nirav Thakkar learned counsel for respondent no.4.

#. This is an application for transfer of Sessions Case pending in the court of learned Additional Sessions Judge, Vadodara arising out of a criminal complaint lodged with the City Police Station of Vadodara City vide Cr-I 157 of 1999 dated 30.5.1999. The informant was the real brother of deceased Govindram Surtani. This petition is moved in view of the provisions of Section 407 of Cr.Procedure Code (hereinafter referred to as the Code.) Earlier, the petitioner had moved similar application in the month of October i.e. 29.10.2001 to get the Sessions Case transferred. But ultimately the application was withdrawn. On 25.1.202 the petitioner was granted permission to withdraw the application with a view to approach the Sessions Judge with similar application.

#. On 4.2.2002 the petitioner applied for transfer before the learned Sessions Judge and the application was heard on merits and by a speaking order the learned Sessions Judge was pleased to dismiss the application referring to certain decisions of the Apex Court as well as this court especially in the light of the provisions made in section 409 of the Code. After rejection of the application preferred to the learned Sessions Judge on 6.2.2002, this application has been moved by the very petitioner on 30.7.2002. This petitioner was listed for admission on 2.8.2002 and on that day this Court (Coram: C.K.Buch-J) passed the following order:

> "Notice returnable on 9.8.2002. the copy of this petition be sent to the concerned Sessions Judge and should be asked to give his remarks. He may send his remarks in a sealed cover so as to reach this court on or before 9.8.2002. It is clarified that there is no stay granted by this Court against the pending proceedings at this stage."

#. On 3.8.2002 when the case was called out by the learned Sessions Judge though there was no formal stay granted by this court the learned advocate appearing for the petitioner prayed for time referring to the filing of the present transfer application and quoting the next date of hearing fixed by the court i.e. 9.8.2002. The court was informed on that day i.e. 2.8.2002 that the case has been posted for judgment. Looking to the proceedings given by Mr. Nirav Thakkar and the remarks

offered by the concerned learned Addl.Sessions Judge it is amply clear that recording of evidence in the trial was over earlier and the statements of the accused under section 313 of the Code were also recorded in the month of May 2002. Conducting the trial, arguments were heard in the month of June 2002.

#. It is pointed out that the present petitioner had moved Special Cri.Application No. 122 of 2002 praying that further investigation into the case be made by a special squad as ordered by the Director General of Police, Gujarat State, Gandhinagar and for submitting its report to this Court along with other ancillary prayers. This petition was filed somewhere in the month of January 2002 and ultimately it was listed for final hearing on 9.7.2002. The Court by oral judgment dismissed the application observing in paras 14 and 15 that:

> "14. On overall view of the matter, I am fully satisfied that the order dated 13th December 2000 passed by the Deputy Director General of Police, Gujarat State, Gandhinagar has been fully complied with and investigation is made under the supervision of the Special Squad headed by Mrs. Geetaben Johri, Additional Commissioner of Police, Baroda City.
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> 15. Seen in the above context, there is no valid reason for justifiable ground to entertain this petition, which deserves to be dismissed."

Copy of the order passed by this Court (Coram: A.M.Kapadia-J) has been tendered by the learned counsel appearing for respondent no.4 for the perusal of this court while submitting that present application is nothing but shear abuse of process.

#. So on the date of the judgment i.e. 9.7.2002 the parties were aware including the present petitioner that the material part of the trial is over and only judgment was to be pronounced. However, till 30.7.2002, no application for transfer of Sessions trial was moved. There are serious allegations made against the Presiding Officer of the Court as well as the Public Prosecutor appearing in the matter. On one hand the petitioner has tried to praise objectivity during appearance of learned APP that he has made and on the other hand she has also tried to condemn his approach with the complainant and the prosecution witnesses and even his authority to conduct the trial.

#. It is true that at one point of time the District Magistrate by a written intimation had instructed the PP of the district to hand over the matter to some other Addl.PP. This aspect was brought to the notice of learned Presiding Officer. In reference to this and the allegations made in the petition, remarks are called for from the learned Addl.Sessions Judge and on perusal of the allegation in the light of the remarks offered by the learned Addl.Sessions Judge, the allegations are found not only perverse but also illegal. The District Magistrate has never withdrawn the appearance of the learned APP regularly appearing in the trial. The correspondence between the District Magistrate and the PP, if considered, is of advisory/recommendatory in nature. No formal prohibition was imposed against the learned APP Shri Biniwala nor his appearance was revoked by the District Magistrate. Mr. Biniwala was not even asked by any of these two authorities namely, District Magistrate or Public Prosecutor of the district to withdraw his appearance. Considering some administrative convenience or for any other reason if the District Magistrate recommends to the PP in charge of the office of Public Prosecutor to hand over a case to some other Addl.PP does not amount to withdrawal of the said Addl.PP from the said case. Such interpretation may affect the morale adversely of the high office of Public Prosecutor. If the Public Prosecutor incharge of the office opts to withdraw the matter from the particular learned APP from the Trial, considering previous changes/replacements, then it was the legal obligation on the part of the concerned APP to continue with the trial as the court was interested in speedy disposal of the matter. It was not possible in absence of any legal order to deny appearance of learned APP appearing for prosecution in the matter. It is also not the case or fact that Mr. Biniwala learned APP appearing in the matter himself had requested the court that he may be permitted to leave the trial. So the allegations made against the Presiding Officer on this count are found to be baseless. On the contrary on 9.7.2002 when the trial was awaiting final order, present petitioner had attempted to see that the matter is investigated further so that the trial can be protracted further.

#. The approach of the Court qua the two main witnesses viz the petitioner and the brother of the deceased complainant is also found justified. There is no element of prejudicial behavior against any of these two witnesses. It is apparently clear that till the date on which the present petitioner was dragged to the court room by the police under a non bailable warrant, she had

not appeared voluntarily. On more than one occasion adjournments were granted to accommodate the present petitioner. On one occasion but for non appearance bailable warrant of Rs. 2000/- was issued by the court so that her presence can be secured and on insistence and with a view to expeditious conclusion of recording of evidence if the court is compelled to issue non bailable warrants and the witness is arrested then she should not make any grievance that the court has taken harsh steps against her or such steps cannot be construed as a step favouring the other side.

#. The prosecution was not able to secure presence of complainant brother and so non-bailable warrants were issued by the Court on 4th October, 6th October and 10th October 2001. On 17.10.2001, fresh non bailable warrant was ordered to be issued to the complainant brother. On that day, the accused applied, because the present petitioner was not appearing in the court on service of witness summons vide exh.137, to issue non-bailable warrant against present petitioner. On 22.10.2001 the complainant brother applied through advocate Ms. Madhuben Surtani for cancellation of non bailable warrant and on that day present petitioner was to appear before the court. But she also applied for time vide exh.141. On the next day of the trial i.e. 23.10.2001 the petitioner applied for time vide application exh. 144. On 24.10.2001 and 25.10.2001 the trial had proceeded further and on 25.10,.2001 the petitioner had applied for time. On 31.10.2001 when the court found that the petitioner-Kavitaben is not present and application for time has been tendered, the court decided to issue bailable warrant for Rs. 2000/- returnable on 2.11.2001. On 2.11.2001, she again applied for time and on 3.11.2001 the petitioner appeared through her advocate Mr. Giglani and the court decided to issue non bailable warrant against her and ultimately on 5.11.2001 the court was able to secure presence of the present petitioner. It seems that the approach of the court to the petitioner was comparatively liberal but she has attempted to take disadvantage of the situation. The court is aware of the well established principle that justice should not only be done but should also seem to be done. It is apparently clear that at the investigation stage two other Special Criminal Applications were also moved and both of the petitions have been dismissed by this court. As discussed earlier, in all the 3 petitions have been rejected. Therefore, it can be inferred that filing of the third petition was not at all warranted. So before some hours of declaration of judgment and after the dismissal of Special Cri.Application 122 of 2002 on

9.7.2002, this petition seems to have been filed as an after thought as a pressure tactics and to circumvent a judicial proceedings conducted in accordance with the directions given by the Apex Court in number of decisions and in light of section 309 of the Code. Mr. Parekh has tried to explain that there is vested interest of one person viz. Lachu Bhoria in this litigation but he is a distant relative of the petitioner. It is also on record that the advocate appearing for the complainant was also put to an embarrassing position before the Sessions Court and he had to appear in an apological manner. On 5.11.2001 the deposition of the present petitioner was recorded by the Trial Court. Of course presence of said Lachu Bhoria today in this court room is not relevant but it is relevant to note that this very person was named as an accused in the FIR lodged by the real brother of the deceased and a prosecution witness. It is true that the investigation has taken a sharp turn at subsequent stage. But when it is specifically argued by the other side that the present petitioner has tried to abuse the process of the court the adverse inference is that this Lachu Bhoria might be taking interest in the litigation either in favour of the present petitioner or against the accused under trial. This possibility cannot be ignored. Filing of a Revision Application by petitioner on 1.2.2002 is also important because, I am told that said Revision Application has been withdrawn. By means of filing that revision application, the petitioner had attempted to see that Presiding Officer of the Court examines around 14 witnesses whose statements were not recorded by the investigating officer or atleast copy of which has not been supplied to the accused with the charge sheet. It seems that the original complainant attempted to see that these 14 persons are examined as court witness so that in absence of availability of previously recorded statements, by investigating agency, the side of the accused may suffer serious prejudice while cross examining those persons. Why the Sessions Court should call number of witnesses as court witnesses is a question requires a convincing answer. Withdrawal of revision application is also a relevant aspect where it is alleged that somebody is taking interest in protraction of trial of an under trial prisoner.

#. In short there is no merit in this petition. So the same is dismissed.

##. Before parting with the order it would be appropriate to observe also that filing of this petition

is nothing but an attempt to harass the Presiding Officer of the Court and the Addl.Public Prosecutor and the same is also filed as an after thought and at a belated stage. The petitioner could have approached this court with some valid good reason immediately after 6.2.2002, the date on which the application for transfer was dismissed. So the petitioner should be fasten with the liability of costs which is quantified at Rs. 5000/-. (Rupees five thousand only) The petitioner is directed to deposit the amount of court in this court; otherwise the same be recovered as amount of fine. If the amount is deposited in the court or recovered as if fine, the same will go to the coffers of the State .

##. The registry is directed to inform about the concerned Sessions Court telephonically about the dismissal of this petition.

(C.K.Buch-J)

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